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No. 98-1036

IN THE
SUPREME COURT OF THE UNITED STATES

THE STATE OF ILLINOIS,
Petitioner,

v.

WILLIAM A/K/A SAM WARDLOW,
Respondent.

On Writ of Certiorari to the
Supreme Court of Illinois

BRIEF *AMICUS CURIAE* OF THE RUTHERFORD INSTITUTE FOR RESPONDENT

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QUESTION PRESENTED FOR REVIEW

I. Whether the sudden and unprovoked flight from a clearly identifiable police officer, who is patrolling a high crime area, is sufficiently suspicious to justify a temporary investigatory stop pursuant to *Terry v. Ohio*.

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BRIEF *AMICUS CURIAE* OF THE RUTHERFORD INSTITUTE FOR RESPONDENT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

I. STATEMENT OF *AMICUS CURIAE* INTEREST AND INTRODUCTION[1]

The Rutherford Institute is an international, non-profit civil liberties organization with offices in Charlottesville, Virginia and internationally. The Institute, founded in 1982 by its President, John W. Whitehead, educates and litigates on behalf of constitutional and civil liberties. Attorneys affiliated with the Institute have filed petitions for writ of *certiorari* in the United States Supreme Court in more than two dozen cases, and *certiorari* has been accepted in two seminal First Amendment cases, *Frazee v. Dept of Employment Sec.*, 489 U.S. 829 (1989) and *Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 666 (1998). Institute attorneys have filed over three dozen *amicus curiae* briefs in the United States Supreme Court, including recent criminal justice cases *Wyoming v. Houghton*, __ U.S. __, 119 S.Ct. 1297 (1999) and *Slack v. McDaniel*, __ U.S. __, 119 S.Ct. 1025 *(cert. granted)*, Sup.Ct. No. 98-6322 (October Term 1998), as well as a multitude of *amicus curiae* briefs in the federal and state courts of appeals. Institute attorneys currently handle several hundred cases nationally, including numerous Fourth Amendment cases. The Institute has published educational materials and taught continuing legal education classes in this area as well.

[1] *Amicus curiae* The Rutherford Institute files this brief with the consent of counsel for both parties. Counsel for The Rutherford Institute authored this brief in its entirety. No person or entity, other than the Institute, its supporters, or its counsel, made a monetary contribution to the preparation or submission of this brief.

II. SUMMARY OF ARGUMENT

The Supreme Court has directly held that a police pursuit of a subject, in and of itself, does not constitute a "seizure" of that subject, regardless of whether reasonable suspicion to stop or probable cause to arrest exists. *California v. Hodari*, 499 U.S. 621 (1991); *Brower v. Inyo County*, 489 U.S. 593 (1989); *Michigan v. Chesternut*, 486 U.S. 567 (1998). *California v. Hodari* held, on facts substantially similar to those in the case now before the Court, that a subject who fled from approaching officers in a high-crime area was not "seized" in the course of the chase or when confronted by an officer at the end of it, but only upon being tackled by the officer. 499 U.S. at 626 ("assuming [the officer's] pursuit ... constituted a 'show of force' enjoining [the defendant] to halt, since [defendant] did not comply with that injunction he was not seized until he was tackled"). Consequently, no reasonable suspicion of the subject was required to justify the admission into evidence of a rock of cocaine the subject dropped when confronted. 499 U.S. at 629. In the present case, therefore, the Court's prior rulings suggest that the officers' pursuit of Respondent did not, and could not, produce a "seizure" of Respondent until he was "cornered," "stopped" and subjected to "a protective pat-down search" for weapons. *Illinois v. Wardlow*, 183 Ill.2d 306, 308, 701 N.E.2d 484, 485, *cert. granted*, 119 S.Ct. 1573 (1998).

The Court now considers the question it left open in *California v. Hodari* and *Michigan v. Chesternut*: "whether the act of fleeing, by itself, [is] sufficient to constitute reasonable suspicion justifying [a] seizure." *Chesternut*, 486 U.S. at 572.[2]

[2] *See also Hodari*, 499 U.S. at 623:

> That is would be unreasonable to stop, for brief inquiry, young men who scatter in panic upon the mere sighting of the police is not self-evident .... We do not decide that point

The Court's *amicus* submits that in view of the Court's *dictum* in *Chesternut* and *Hodari* questioning the propriety of an "investigatory pursuit," and the inevitable use of such a tool to harass and intimidate the populace in "high-crime areas," police authorities should not enjoy *carte blanche* under the Fourth Amendment to initiate dangerous foot or vehicle chases simply on the basis of flight. Such a rule would be tantamount to announcing "open season" on individuals who are deemed suspicious and who exercise "at top speed" their constitutional right to refuse to converse with the officers. *Ilinois v. Wardlow*, 183 Ill.2d 306, 701 N.E.2d 484 (1998), *cert. granted*, 119 S.Ct. 1573 (1998), quoting *People v. Shabaz*, 424 Mich. 42, 63, 378 N.W.2d 451, 460 (1985). The touchstone of *Terry* stop jurisprudence has always been the reasonableness of the stop in relation to the totality of the circumstances and the means employed. The Rutherford Institute submits that Illinois' proffered standard is fundamentally unreasonable in both means and ends and thus contravenes the protections of the Fourth Amendment.

III. ARGUMENT

A. THE STATE OF ILLINOIS SEEKS AN UNREASONABLE AND ABUSIVE EXPANSION OF THE RATIONALE FOR PERMITTING BRIEF INVESTIGATORY STOPS ENUNCIATED IN *TERRY V. OHIO* AND SUBSEQUENT CASES.

Terry v. Ohio, 392 U.S. 1 (1968), reviewed an officer's decision to conduct a "pat-down" search for weapons after

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here, but rely entirely upon the State's concession [that the officer lacked reasonable suspicion to stop the defendant].

observing the subjects engaged in behavior consistent with "casing" a store for a burglary. 392 U.S. at 10-11. The opinion of the Court was carefully and explicitly limited in rationale to a concern entirely apart from the governmental interest in investigating crime: the "immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him." 392 U.S. at 23. The Court cautioned:

> [S]uch a search ... is not justified by any need to prevent the disappearance or destruction of evidence of crime. The sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.

392 U.S. at 29.[3]

Nonetheless, commencing almost immediately after the Court's companion decisions in *Terry v. Ohio* and *Sibron v. New York*, 392 U.S. 40 (1968), the carefully crafted exception to the probable cause requirement enunciated in those cases has been progressively expanded until, as one former Justice warned, the *Terry* exception threatens to "swallow the general rule that Fourth Amendment seizures [and searches] are

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[3] For this reason, the Court reversed the conviction of the defendant in the companion case to *Terry*, *Sibron v. New York*, 392 U.S. 40 (1968), on the grounds that a frisk motivated only by a search for narcotics "was not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception -- the protection of the officer by disarming a potentially dangerous man." *Id.* at 65.

reasonable only if based on probable cause." *Florida v. Royer*, 460 U.S. 491, 509 (1983) (Brennan, J., concurring) (quoting *Dunaway v. New York*, 442 U.S. 200, 213 (1979)). The expansion began with *Adams v. Williams*, 407 U.S. 143 (1972), which extended the police safety rationale of *Terry* to permit pat-down searches based on reasonable suspicion of possessory offenses over the vigorous dissents of three of the Justices, one of whom warned that the decision "expand[ed] the concept of warrantless searches far beyond anything heretofore recognized as legitimate." 407 U.S. at 154-55. It continued with an extension of *Terry* stop authority to conduct vehicle searches for illegal immigrants, *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), then to permit searches based upon reasonable suspicion of past criminal activity alone. *United States v. Hensley*, 469 U.S. 221 (1985).

The Petitioner now seeks to further expand the use of investigatory stops to permit arbitrary and indiscriminate run-downs of subjects who elect to depart from the scene of a police investigation, absent any articulable suspicions relating to particular criminal conduct in which the fleeing subject may have been engaged, and apart from any concern that he may be armed and dangerous to the police or the public. For the reasons set forth below, the Court's *amicus* believes such a further expansion would be patently unreasonable and indefensible.

B. AN EXTENDED PURSUIT OF A FLEEING SUBJECT DESPITE HIS OBVIOUS DESIRE TO EXERCISE HIS RIGHT TO AVOID POLICE IS A "SEIZURE," UNDER THE FOURTH AMENDMENT, AND THE RULE OF *CALIFORNIA V. HODARI* SHOULD BE REVISITED IN THESE CIRCUMSTANCES.

A person is seized when the officer, by means of physical force or show of authority, has restrained his freedom of movement. *United States v. Mendenhall*, 446 U.S. 544, 553 (1980); *Terry*, 392 U.S. at 19, n.16. A person who has elected to remove himself from the presence of officers, then finds that the officers are running at him in a threatening fashion and shouting, perhaps with other shows of authority such as cruiser vehicles following, police dogs barking or guns drawn, cannot possibly conceive that he is any longer "free to disregard the questions and walk away." *Mendenhall*, 446 U.S. at 554. He fully comprehends that his subjection to interrogation will be forcibly compelled. To hold otherwise is to redefine "free to leave," *Mendenhall, supra,* to mean "physically able to get away" rather than "authorized to leave."

When a subject exercises his right not to cooperate and walks or runs away, the State is obligated to justify the additional steps taken to chase down and subdue the subject. "[I]f the person refuses to answer and the police take additional steps ... to obtain an answer, then the Fourth Amendment imposes some minimal level of objective justification to validate the detention or seizure." *INS v. Delgado*, 466 U.S 210, 217 (1984).

This Court has condemned the use of force to subdue a suspect unless the suspect is armed and considered dangerous. *Tennessee v. Garner*, 471 U.S. 1 (1985); *cf. Brower v. Inyo County*, 489 U.S. 593. Such a violent subduction is a "seizure" under the Fourth Amendment. 471 U.S. at 7. The Court's majority in *California v. Hodari* appeared to hold that the pursuit of a subject did not constitute a "seizure," but that the tackling of the subject did; and that in fact, the subduction constituted not just an investigatory *Terry* stop, but an actual common law arrest. 499 U.S. at 630 (Opinion of Stevens, J.,

dissenting). This was doubtless due to the Court's perception that the violent run-down of a subject far exceeds the reasonable authority possessed by an officer to conduct a brief, investigatory pat-down of a subject before questioning him. A conclusion that the chase does not raise Fourth Amendment implications, but the physical trapping or subduction of the subject does, would place no reasonable parameters on police means to investigate crime. This result would be directly contrary to the rationale of *Terry* and its progeny, since it would allow completely unaccountable police pursuits of subjects on the sole basis that they have fled in the hope that they will be "flushed out" and discard contraband. Like the sophistry condemned in *Johnson v. United States*, 33 U.S. 10, 16-17 (1948), the State of Illinois seeks to justify the pursuit on the basis of the seizure, and the seizure on the basis of the pursuit.

According to *Hodari,* tackling a subject constitutes a "seizure" akin to an arrest, which requires the existence of probable cause. No probable cause to arrest Respondent has been urged in this case. Illinois' view would sanction pursuit of a citizen by officers who lack legal authority to catch him, in the hope that the subject will panic and discard contraband. This is the very essence of police harassment, the illegal threat to use unauthorized force in order to uncover evidence. The citizen who is exercising his constitutional right to avoid police "at top speed," *Wardlow, supra*, because of a known history of police excesses in his neighborhood will find no solace in the knowledge that their right to chase him down until exhaustion is a weapon proven effective in keeping his streets safe. Nor would this rule result in more actual arrests, since the word would quickly spread on the street that drug dealers will enjoy constitutional protection only if they keep their contraband on their persons and refrain from discarding it. Illinois' rule would

result only in drug dealers who are more physically fit, not a safer populace.

Furthermore, such a "wild west" approach to law enforcement would only serve to exacerbate tensions between law enforcement personnel and citizens. *Amicus* urges the members of the Court to bear in mind the invasive and humiliating nature of a "stop and frisk" search. The *Terry* Court restricted the use of the procedure in light of this understanding:

> [I]t is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a "petty indignity." It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.

392 U.S. at 16-17. The Court went on to measure the nature and quality of the intrusion against police interest in imposing it, noting, "Even a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." 392 U.S. at 24-25.

It is certainly true that "the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct." *Terry*, 392 U.S. at 12 (quoting *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). On the other hand, "Regardless of how effective the [exclusionary] rule may be where obtaining convictions is an important objective of the police, it is powerless to deter

invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal." 392 U.S. at 14. Such is the case where police conduct pursuits of subjects based only on flight in the hopes of "flushing out" contraband. In such a regime, police harassment would take the place of proper investigation as the principle means of crime control. The dangers of such a regime are obvious:

> The right to be secure against searches and seizures is one of the most difficult to protect. Since the officers are themselves the chief invaders, there is no enforcement outside of court .... There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear.

Brinegar v. United States, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting).[4]

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[4] One example of such a case is *Brown v. Texas* 443 U.S. 47 (1979) in which the defendant was observed in a high-crime area, stopped and patted down absent reasonable suspicion that he was armed or engaged in criminal activity. 443 U.S. 47. Ordinarily, the individual would have gone on his way, intimidated and humiliated but unable to obtain redress because the actions of the officer were not susceptible to proof that they were "shocking to the conscience" as amounting to a "deliberate indifference to" or "reckless disregard for" the subject's personal liberty. *Sacramento v. Lewis*, 523 U.S. 833 (1998). It was only because he was arrested and charged for refusing to provide his name that his case came to light, a practice the Court held violative of his right to decline to cooperate. 443 U.S. at 53.

The social costs of such a regime are substantial. The *Terry* Court recognized these costs, and cautioned:

> Proper adjudication of cases in which the exclusionary rule is invoked demands a constant awareness of these limitations. The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial.

392 U.S. at 14-15. Recent research indicates that the "wholesale harassment" by police of minority groups has intensified in recent years. *See generally* David Cole, No Equal Justice: Race and Class in the American Criminal Justice System (New Press, 1999) (noting that a recent poll found that nearly 90 percent of African-Americans in New York thought the police force often engaged in brutality against minorities and two-thirds said such brutality was widespread).

Terry cited The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police 183, 184 (1967), which found, *inter alia*, that "the friction caused by 'misuse of field interrogations' increases 'as more police departments adopt "aggressive patrol" in which officers are encouraged routinely to stop and question persons on the street who are unknown to them, who are suspicious, or whose purpose for being abroad is not readily evident.'" 392 U.S. at 14; n.11. A similar report a year later, the Kerner Commission Report, discussed the practices that contributed to the urban riots of that period, some of which have been or are now before the Court:

> In nearly every city surveyed, the Commission heard complaints of dispersal of social street gatherings and the stopping of Negroes on foot or in cars without objective basis .... One such practice involves a roving task force which moves into high-crime districts without prior notice and conducts intensive, often indiscriminate, street stops and searches.

Report of the National Advisory Comm. on Civil Disorders 157 (1968). The "dispersal of social street gatherings" is the practice the Court is currently reviewing in *Chicago v. Morales*, 177 Ill.2d 440, 687 N.E.2d 53 (1997), 118 S.Ct. 1510 (*cert. granted*); the "stopping of Negroes on foot or in cars without objective basis" was condemned as violative of the Fourth Amendment in *United States v. Brignoni-Ponce*, 422 U.S. 873; the practice of "roving task forces" conducting indiscriminate stops in high-crime areas is the factual context of the present case. *Amicus* contends that the Court should seek to harmonize its holding in the present case with its decision in *Chicago v. Morales* by finding that the police can neither force law-abiding citizens to move on or force them to stand still at the appearance of an officer. *Illinois v. Wardlow*, 183 Ill.2d at 313, 687 N.E.2d at 488.

C. PETITIONER'S SEIZURE OF RESPONDENT DID NOT CONSTITUTE A REASONABLE INVESTIGATIVE STOP.

1. Flight is not, standing alone, a fact sufficient to give rise to a reasonable suspicion that criminal activity is afoot or that the subject is armed and dangerous.

"[The] demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." *Terry*, 392 U.S. at 21, n. 18. As the Court has noted, flight, standing alone, may well be reflective of innocence.[5] As such, it is indistinguishable from other neutral factors which have been held insufficient to justify an investigative stop. Such factors have included several presented in the instant case: presence in a high-crime area, *Brown v. Texas*, 443 U.S. 47, 52 (1979); association with notorious individuals, *Sibron v. New York*, 392 U.S. at 62 ("The inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security."); and race, *United States v. Brignoni-Ponce*, 422 U.S. 873 (practice of the Immigration and Naturalization Service of stopping vehicles away from the border on suspicion of carrying illegal immigrants based solely on the apparent Mexican ancestry of t' e occupants). When a factor such as flight is an activity which is itself constitutionally protected, It can provide no basis for a stop and search.

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[5] *Amicus* suggests that Justice Scalia's hermeneutical digression in *California v. Hodari*, 499 U.S. at 624, n.1 (quoting Proverbs 28:1), was incomplete, and might well have included other proverbs that speak to this point: ""[W]hen the wicked rise to power, men go into hiding." Prov. 28:12; "A prudent man sees danger and takes refuge." Prov. 22:3. *See also Hodari*, 499 U.S. at 630, n.4 (Stevens, J., dissenting) ("We have previously considered, and rejected, this ivory-towered analysis of the real world for it fails to describe the experience of many residents, particularly if they are members of a minority."); *Alberty v. United States*, 162 U.S. 499, 511 (1896) ("[I]t is a matter of common knowledge that men are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that 'the wicked flee when no man pursueth, but the righteous are as bold as a lion.'").

2. Flight, with other facts before the court below, was not sufficient to give rise to a reasonable suspicion that the subject was engaging or preparing to engage in criminal activity or that he was armed and dangerous.

Flight may certainly be one factor in the consideration of reasonable suspicion to stop; indeed, it would severely handicap good police work to hold otherwise. "[D]eliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of *mens rea*." *Sibron v. New York*, 392 U.S. at 66-67; *see also United States v. Brignoni-Ponce*, 422 U.S. 873 (including among factors to be taken into account erratic driving or obvious attempts to evade officers). However, it is only "when coupled with *specific knowledge on the part of the officer relating the suspect to the evidence of crime*" that furtiveness and flight are proper factors to be considered. *Id.*

On the other hand, the Court has also held that authorities cannot lump together factors that, taken together, do not sufficiently restrict the inquiry. Diligence is necessary, the Court has warned, to ensure that the "very large category of presumably innocent" citizens who wish not to speak with police officers are not subject to "virtually random seizures." *Reid v. Georgia*, 448 U.S. 438, 441 (1980) (a variety of circumstances which fell under the "drug courier profile" held insufficient to permit a stop because they encompassed a very large category of innocent travelers). Thus, in *Brown v. Texas*, the Court held that "looking suspicious" and being in an alley frequented by drug users were not sufficient factors to justify an investigative stop. 443 U.S. 47; *but cf. United States v. Sokolow*, 490 U.S. 1 (1989) (rule recognized, but factors held sufficient to justify stop).

Furthermore, other factors relating to the reasonable perception of the subject himself should also be considered in determining the existence of reasonable suspicion. Such factors include the incidence of police harassment or brutality in the neighborhood; the racial, ethnic, gender or other minority status of the subject, *United States v. Mendenhall*, 446 U.S. at 558 (it was "not irrelevant" to consider factors that the defendant was a black female who "may have felt unusually threatened by the [white male] officers") and the circumstances surrounding the appearance of the police on the scene, particularly the extent of the show of force, *e.g., Louisiana v. White*, 660 So.2d 515 (1995) (subjects fled when seven to eight officers converged on a vacant lot in an "organized routine patrol strike"), and whether the police are plainly identifiable as such. *Cf. Sibron v. New York*, 392 U.S. at 75 ("flight at the approach of a gun-carrying stranger ([the officer] was apparently not in uniform) is hardly indicative of *mens rea*.").

3. The means used to physically run down and seize the subject are not reasonably related to the end of questioning the subject.

The State of Illinois' actions also flout the central rule of *Terry* stop jurisprudence, that "[t]he scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Terry*, 392 U.S. at 19 (quoting *Warden v. Hayden*, 387 U.S. 294, 310 (1967)); *United States v. Brignoni-Ponce*, 422 U.S. 873; *United States v. Mendenhall*, 446 U.S. 554; *Florida v. Royer*, 460 U.S. at 500. "The manner in which the seizure and search were conducted is, of course, as vital a part of the inquiry as whether they were warranted at all." 392 U.S. at 28. The investigative methods employed pursuant to a *Terry* stop "should be the least intrusive

means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Royer*, 460 U.S. at 500. In reviewing police conduct in this area, the burden is upon the State to demonstrate the reasonableness of the scope and duration of the search in relation to its legitimate purpose. 460 U.S. at 500.

The Court determined in *Florida v. Royer* that an investigation that was permissible at its inception became an impermissible seizure by virtue of its extended duration and the coercive effect of taking the subject's airline tickets away, recovering his luggage and questioning him in a small, bare room. 460 U.S. at 502. An implication of the Court's opinion in is that the restriction on the defendant's ability to depart from the area within a reasonable period of time kept the search from being reasonably limited in scope to the purposes which justified it. Similarly, in *Dunaway v. New York*, an hour-long detention of the defendant was held to be "in important respects indistinguishable from a traditional arrest," since the defendant was never informed that he was 'free to go,' and would have been physically restrained if he had refused to accompany the officers or had tried to escape their custody. 442 U.S. at 212.

This view is consistent with general Fourth Amendment safeguards laid down by the Court in other contexts. Even a search incident to a lawful arrest must be limited in scope to that which is justified by the purposes served by that exception to the warrant requirement. *Florida v.Royer* , 460 U.S. at 498. Likewise, the "hot pursuit" exception to the warrant requirement permits the warrant requirement to be abandoned in the context of probable cause to arrest a fleeing suspect, but not reasonable suspicion to interrogate. *Johnson v. United States*, 333 U.S. 10 (1948). The chases under consideration in the instant case are much more characteristic of "hot pursuit,"

which may involve "an extended hue and cry 'in and about [the] public streets,'" than of an ordinary "stop and frisk." *United States v. Santana*, 427 U.S. 38, 43 (1976).

The Court's instruction in this area imposes a means-ends test for the reasonableness of an investigative tactic. The Court's *amicus* respectfully submits that the majority's perspective in *Sokolow* that "[t]he reasonableness of the officer's decision to stop a suspect does not turn on the availability of less intrusive investigatory techniques," 490 U.S. at 11, is not applicable in the context of a physically strenuous and risky pursuit like that in the instant case, where the police have ample opportunity to investigate criminal activity by other means, such as questioning those remaining at the location or neighbors living in the area.

Additionally, the practice of chasing subjects who may be armed down alleys on foot, or in police vehicles at high speed, actually increases the danger of injury or death to police officers and the public. This is contrary to the chief purported purpose of an investigatory stop and frisk. The counsel of Justice Harlan, concurring in *Terry*, is on point:

> Any person, including a policeman, is at liberty to avoid a person he considers dangerous. If and when a policeman has a right instead to disarm such a person for his own protection, he must first have a right not to avoid him but to be in his presence. That right must be more than the liberty (again, possessed by every citizen) to address questions to other persons, for ordinarily the person addressed has an equal right to ignore his interrogator and walk away; he certainly need not submit to a frisk for the questioner's protection.

392 U.S. at 32-33; *accord United States v. Mendenhall*, 446 U.S. at 553. Where an investigatory tactic poses a heightened danger to the police and the public, a concomitant heightened standard to justify the use of the tactic should also be imposed.

It is true that the "often competitive enterprise of ferreting out crime" requires that police have the authority to thoroughly investigate criminal activity and to disarm dangerous citizens. *Terry*, 392 U.S. at 12, quoting *Johnson v. United States*, 333 U.S. at 14. Nonetheless, it is equally true that the Supreme Court has "repeatedly decided that [the Fourth Amendment] should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers." *Gouled v. United States*, 255 U.S. 303, 304 (1921). The "shotgun approach" to crime control displayed by the police in the instant case is markedly haphazard compared to the methodical, creative and deliberative police work that led to investigative stops that were upheld by the Court in other cases. *E.g., United States v. Cortez*, 449 U.S. 411 (1981); *Illinois v. Gates*, 462 U.S. 213 (1983). "A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of *legitimizing the conduct which produced the evidence*, while an application of the exclusionary rule withholds the constitutional imprimatur. *Terry*, 392 U.S. at 13 (emphasis supplied). Because they exceeded the bounds of what was reasonable and necessary to investigate illegality, the authorities in this case cannot be said to have exhibited the "restrained investigative conduct" the Court has sought to foster. *Terry*, 392 U.S. at 15. The decision of the Supreme Court of Illinois should consequently be affirmed.

IV. CONCLUSION

The Rutherford Institute respectfully suggests that the Court heed the words of Justice William O. Douglas, which are as true now as they were when written thirty years ago:

> There have been powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand. That hydraulic pressure has probably never been greater than it is today.
>
> Yet if the individual is no longer to be sovereign, if the police can pick him up whenever they do not like the cut of his jib, if they can "seize" and "search" him in their discretion, we enter a new regime. The decision to enter it should be made only after a full debate by the people of this country.

Terry v. Ohio, 392 U.S. at 60-61 (Douglas, J., dissenting). The State of Illinois now beckons the Court to enter this "new regime" by sanctioning dangerous police chases of civilians based upon little or no reasonable suspicion of criminal conduct. The Court's *amicus* believes the Fourth Amendment does not countenance the police authorities of this nation making sport of its citizens. The Rutherford Institute respectfully submits that the judgment of the Supreme Court of Illinois should be affirmed.

Respectfully submitted,

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